No. 81-5944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES DWIGHT MESSER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

RECEIVED

JAN 23 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii, iii
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1, 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	2
I. THE FLORIDA SUPREME COURT DID NOT ERR IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE TRIAL JUDGE IMPROPERLY PERMITTED THE STATE ATTORNEY TO TESTIFY AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION.	2-10
II. WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER WAS ERROR ON THE GROUND THAT THE TRIAL JUDGE CONSIDERED AN INVALID AGGRAVATING CIRCUMSTANCE WHERE THERE WERE OTHER VALID AGGRAVATING CIRCUMSTANCES SUFFICIENT TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.	10-16
III. WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.	16-21
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF CITATIONS

CASES	PAGE(S)
Alford v. State, 355 So.2d 108 (Fla. 1977), cert. denied, 436 U.S. 935	20
Alvord v. State, 322 So.2d 533 (Fla. 1975)	6
Armstrong v. State, 399 So.2d 953 (Fla. 1981)	12,15
Bachellar v. Maryland, 397 U.S. 564 (1970)	12
Brown v. State, 381 So.2d 690 (Fla. 1980)	12
Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)	16
Brown v. Wainwright, ___ U.S. ___ (1981), 30 CrLRep. 4066	19
Burger v. Georgia, 446 U.S. 988 (1980)	13
Burger v. State, 265 S.E.2d 797 (Ga. 1980)	13,14
Donnelly v. DeChristoforo, 416 U.S. 637, 642-643 (1974)	16
Ex Parte Farley, 577 S.W.2d 617 (Ky. 1978)	21
Ford v. Strickland, ___ F.Supp. ___ (S.D.Fla 1981), Case No. 81-6663-Civ-MCR, opinion filed December 10, 1981	19
Foster v. Strickland, 517 F.Supp. 597, 607 (N.D.Fla. 1981)	19
Gardner v. Florida, 430 U.S. 349 (1977)	16,20, 21
Gates v. Georgia, 445 U.S. 938 (1980)	13
Gates v. State, 261 S.E.2d 349 (Ga. 1979)	13,14
Gregg v. Georgia, 428 U.S. 153, 161-62 (1976)	14
Hargrave v. State, 366 So.2d 1 (Fla. 1979)	10
Ingraham v. Wright, 430 U.S. 651, 675 (1977)	16
Messer v. State, 330 So.2d 137 (Fla. 1976)	2
Messer v. State, 403 So.2d 341 (Fla. (1981)	1,9,10
Proffitt v. Florida, 428 U.S. 242 (1976)	16
Rakas v. Illinois, 439 U.S. 128 (1978)	20
Sireci v. State, 399 So.2d 964 (Fla. 1981)	15
Slater v. State, 316 So.2d 539 (Fla. 1975)	4,7,9
Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 81-89)	11,12, 14

TABLE OF CITATIONS (Cont'd)

	PAGE(S)
Street v. New York, 394 U.S. 576 (1969)	12
Stromberg v. California, 283 U.S. 359 (1931)	12
United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976)	20
Westbrook v. Balkcom, ___ U.S. ___, 101 S.Ct. 541, 66 L.Ed.2d 298 (1980)	13,14
Yates v. United States, 354 U.S. 298 (1957)	12

STATUTES

Section 921.141, Florida Statutes (1973)	2,11
Section 921.141(1), Florida Statutes	5,6
Section 921.141(5)(f), Florida Statutes	11

OTHER AUTHORITIES

Title 28, United States Code, § 1257(3)	1
Fifth Amendment, United States Constitution	2
Sixth Amendment, United States Constitution	2
Fourteenth Amendment, United States Constitution	2

No. 81-5944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES DWIGHT MESSER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 403 So.2d 341 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER BECAUSE THE STATE ATTORNEY WAS PERMITTED TO TESTIFY AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION.

II.

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER WAS ERROR ON THE GROUND THAT THE TRIAL JUDGE CONSIDERED AN INVALID AGGRAVATING CIRCUMSTANCE WHRRE THERE WERE OTHER VALID AGGRAVATING CIRCUMSTANCES SUFFICIENT TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

III.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Fifth, Sixth, and Fourteenth Amendments to the federal constitution.

STATEMENT OF THE CASE

Respondent has no quarrel with petitioner's statement of the case and accepts same as set forth in his petition on pp. 1, 2 thereof.

ARGUMENT

I.

THE FLORIDA SUPREME COURT DID NOT ERR IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE TRIAL JUDGE IMPROPERLY PERMITTED THE STATE ATTORNEY TO TESTIFY AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION.

The Florida Supreme Court has previously affirmed petitioner's conviction for first degree murder and robbery. Messer v. State, 330 So.2d 137 (Fla. 1976). However, the court

vacated the death sentence and remanded for a new sentencing proceeding before a jury. In so doing, the court commented as follows:

> It is our conclusion that the trial court erred in application of the statute in two particulars. First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the codefendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See Slater v. State, 316 So.2d 539 (Fla. 1975). Although the Slater case, supra, involved evidence that the "trigger man" was permitted to negotiate a plea for a sentence of life imprisonment, under the facts of this particular case we believe the reasoning of Slater applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. [Emphasis ours.]

Id. at 141, 142. When Mr. Golden was called to testify for the state at the sentencing hearing, defense counsel objected (App. G-1). His objection was premised on the theory that it was perfectly permissible for Mr. Golden to give his reason for the negotiated plea with petitioner's accomplice but that this must be done by introducing evidence as to his reasons, rather than testifying as to those reasons. It appears to respondent that this is a distinction without a difference. When Mr. Golden testified under oath, he was, in truth, "introducing evidence" as to his reasons in exercising his prosecutorial discretion. There was some hassling between the trial judge and defense counsel on this issue as the judge was seeking to understand the basis of

defense counsel's objection. Finally, Judge Wells remarked as follows:

> JUDGE: Well, it appears to me that Mr. Golden would have the same right or responsibility to tell the basis upon which he accepted that negotiated deal as he did in making the deal to start with. The court has cast upon us the burden to require the jury to hear that evidence, i.e., that the co-defendant did get a negotiated deal, and so in furtherance of that evidence I think it is incumbent upon this court to hear the reason why, and since Curtis Golden apparently made that decision then I think it is incumbent upon him to tell the jury why he made it, and let them weigh that along with the other. So, I would allow it to be made.

(App. G-4)

In reversing for a new sentencing hearing, the Florida Supreme Court quoted its prior decision in Slater v. State, 316 So.2d 539 (Fla. 1975), for the principle that defendants should not be treated differently upon the same or similar facts. This being so, the only way the jury could learn of all the facts surrounding the state attorney's agreement to accept a negotiated plea of guilty from petitioner's accomplice was for him (state attorney) to take the stand and testify as to the facts as he knew them and as they had been made known to him. This is the only way the jury could properly be advised as to why the accomplice, Ronnie Brown, was treated differently upon similar facts.

As previously stated, the Florida Supreme Court pointed out that there was little "to separate out the joint conduct of the codefendants." 330 So.2d, at 142. Based on the principle articulated in Slater v. State, supra, the Florida Supreme Court reversed because the first sentencing jury was not advised as to why the accomplice Brown was treated differently upon similar facts. Now, because the trial judge made every effort to comply with the directions of the Florida Supreme Court by permitting

the state attorney to testify as to those facts which in his opinion justified a different treatment for the accomplice Brown, petitioner claims error.

The testimony of State Attorney Curtis Golden in its entirety is bound together and submitted to this court as Respondent's Appendix. The testimony comprises 65 pages and a review thereof will show that Mr. Golden was subjected to a thorough and exhaustive cross-examination. Everything that Mr. Golden testified to, whether as to facts within his own knowledge or otherwise, was thoroughly challenged in every way possible by counsel for petitioner.

Section 921.141(1), Florida Statutes, provides that at the sentencing hearing, "evidence may be presented as to any matter that the court deems relevant to sentence" and such evidence may be received "regardless of its admissibility under the exclusionary rules of evidence." The statute further provides that defendant is to be given a fair opportunity to rebut any hearsay statements and that the statute should not be construed to authorize the introduction of evidence secured in violation of the constitution, state or federal. Not only was petitioner given a "fair opportunity" to rebut any alleged hearsay testimony given by State Attorney Golden, he was given every opportunity to do so. The sentencing hearing before the trial judge was a plenary hearing. Fourteen witnesses testified and petitioner had every opportunity to rebut, deny, or explain any testimony that he desired to challenge. This he did not do. In fact, as respondent read his brief filed with the Florida Supreme Court, he did not contend that he was never given a "fair opportunity" to rebut any alleged hearsay testimony given by any witness. Neither did his brief urge that there was evidence introduced at the hearing that had been seized in violation of the Constitution of the United States or the State of Florida. The Florida

Supreme Court in construing subsection 921.141(1), Florida Statutes, held that a "circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations." 330 So.2d, at 142. The case of Alvord v. State, 322 So.2d 533 (Fla. 1975), well illustrates the broad discretion granted trial judges in this area. There, the error complained of was the permitting of a Dr. Robey to testify in the penalty phase of the trial that the defendant was sane at the time he committed a rape in the State of Michigan. In disposing of this contention, the Florida Supreme Court remarked as follows:

> In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. In fact, one of the statutory mitigating circumstances is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Fla.Stat. §921.141 (6)(f), F.S.A. There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence. State v. Dixon, supra. See also Sullivan v. State, 303 So.2d 632 (Fla. 1974), and Smith v. State, 303 So.2d 694 (Fla. App.1st, 1974). This testimony was properly allowed into evidence.

Id. at 538, 539.

In the case at bar, the Florida Supreme Court reversed for a new sentencing hearing simply because the jury was not properly advised that petitioner's accomplice, Ronnie Brown, had been permitted to enter a plea of guilty to second degree murder and the circumstances which justified the state attorney in accepting this negotiated plea. Now, all of these facts were brought to the attention of the jury via Mr. Golden's testimony and petitioner still claims that he has been deprived of several, if

not all, of his constitutional rights. As respondent reads petitioner's argument, it seems that he agrees, as he must, that Brown's negotiated plea of guilty to second degree murder was properly placed before the jury. However, he strenuously objects to the testimony of Mr. Golden as to those facts and circumstances which justified the state attorney in accepting the negotiated plea of guilty to second degree murder. Frankly, if the state had not presented testimony as to those circumstances which justified a different treatment for Brown than that which was given petitioner, then the state's position would be vulnerable to attack under the teaching of Slater v. State, supra.

At the conclusion of State Attorney Golden's testimony, petitioner through his counsel moved to discharge the jury and have the court to impose a sentence of life imprisonment on the ground that the prosecuting attorney impermissibly exercised arbitrary discretion by permitting the accomplice, Ronnie Brown, against whom the prosecuting attorney had ample evidence of first degree murder, to plead to a lesser offense. The trial judge then asked the question, assuming arguendo that Mr. Golden had abrogated his responsibility in accepting the plea from Brown, how would this affect the sentence to be imposed against petitioner. Petitioner's counsel then backed up and stated that it was not his intention to indicate that Mr. Golden had ever done any violation of a statute or failed to properly exercise his responsibility under the law. Indeed, this is precisely what petitioner's counsel had been arguing and the judge then remarked: "I thought that was what he was arguing?" See Respondent's Appendix, pp. 258, 259. Now then, please note the following:

> FLEMING: That was my point, Your Honor, and I do not suggest misconduct on Mr. Golden's part as elected State Attorney and as the prosecuting attorney. Prosecutors do have discretion ...

JUDGE: How does the discretion which he exercised in one defendant's case mitigate in favor of the other defendant? That's what I'm asking you.

FLEMING: Your Honor, we have shown circumstances here, and the evidence has shown by Mr. Golden's own testimony that these two defendants participated in the same ...

JUDGE: I recognize and accept the fact -- accepting that argumentum -- but take now that he has exercised that discretion against one that is equally guilty with the other -- and assume for the sake of argument that they are equally guilty. How does that mitigate in favor of your defendant? That is what I'm asking you.

FLEMING: Your Honor, it makes Mr. Messer no less guilty of the offense, but what it does do is to point out the arbitrariness with which the death penalty can be applied in this nation of ours -- such arbitrariness that the Supreme Court of the United States has criticized the decision of Furman v. Georgia in which this present statute in Section 921 of the Florida Statutes attempted to alleviate by setting forth specific aggravating and mitigating circumstances by which those enumerated circumstances alone determined which penalty a person was to receive. We have expanded beyond those ennumerated circumstances, Your Honor, and entered into others which the legislature had not permitted, thereby showing, Your Honor, that there are indeed...

JUDGE: Mr. Fleming, you are arguing the same thing that has been argued before the Florida Supreme Court as the basis for declaring the statute unconstitutional. The court has ruled that it is constitutional, and your purpose in being here today is for the jury to hear the mitigating and aggravating circumstances. I am going to deny your motion.

(The jury, which had been removed from the courtroom during the argument on this motion, was returned to the jury box.)

(Respondent's App. 260, 261) It is noted that petitioner's counsel was never able to answer the trial judge's question as to just how any improper exercise of prosecutorial discretion by State Attorney Golden would affect the sentence to be imposed on petitioner. This was also noted by the Florida Supreme Court

when it handed down its decision in Messer v. State, 403 So.2d 341 (Fla. 1981). Note the following:

> The sentencing judge asked defense counsel to explain why the state attorney's exercise of discretion with regard to the case against Brown, whether it was proper or improper, had anything at all to do with the question of what sentence should be imposed upon Messer. After further argument, the court denied the motion.

Id. at 347.

It is respectfully submitted that the reasons given by State Attorney Golden in support of the exercise of his prosecutorial discretion has nothing whatever to do with the determination of sentence imposed on petitioner. After all, this case was reversed in the first instance (330 So.2d 137) so that petitioner could place before the jury in the penalty phase of the trial the fact that his accomplice had been permitted to enter a plea of guilty to the lesser included offense of second degree murder. If the record had been permitted to stand in that fashion, then we would have two defendants with little to distinguish between their culpablity receiving disparate sentences. This is not permitted under Florida law and would be vulnerable to attack under the teaching of Slater v. State, supra. This is precisely the reason why the prosecution desired to make a matter of record the reasoning of State Attorney Golden for exercising his prosecutorial discretion in such a manner.

Hence, the Florida Supreme Court properly concluded as follows:

> In his initial appeal of his conviction and sentence, Messer successfully maintained that he should have been allowed to tell the jury that Brown had been allowed to plead guilty to second degree murder and had received a thirty-year sentence. Messer v. State, 330 So.2d 137 (Fla. 1976). We hold that it was within the discretion of the trial court to allow the state to explain to

> the jury through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

Messer, 403 So.2d, at 349.

II.

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER WAS ERROR ON THE GROUND THAT THE TRIAL JUDGE CONSIDERED AN INVALID AGGRAVATING CIRCUMSTANCE WHERE THERE WERE OTHER VALID AGGRAVATING CIRCUMSTANCES SUFFICIENT TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

The Florida Supreme Court rejected petitioner's argument under this point as follows:

> The only error we find in the judge's consideration of the circumstances of the crime is that the finding that the murder was committed in the course of a robbery and the finding that it was committed for pecuniary gain both relate to the same aspect of the crime. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). This error, however, was harmless. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

In Hargrave v. State, 366 So.2d 1 (Fla. 1979), the Florida Supreme Court reasoned as follows:

> We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1976), condemns the doubling up of the aggravating circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Id. at 5.

In the instant case, if we exclude the aggravating circumstance of pecuniary gain [§ 921.141(5)(f), Fla.Stats.], then there is left remaining three valid aggravating circumstances, the validity of which is not challenged. First, the trial judge found that the murder was committed while petitioner was in the process of committing the crime of robbery; secondly, the murder was committed in a manner which the trial judge found to be especially atrocious and cruel; and petitioner had been previously convicted of a felony involving the use or threat of violence to the person, i.e., manslaughter. All three are valid aggravating circumstances under Florida's present capital sentencing statute (921.141) and were so at the time petitioner was convicted. Please see petitioner's appendix D-1.

But the foregoing notwithstanding, it is vehemently urged to this Court that the decision of the Florida Supreme Court sub judice directly conflicts with that of the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 81-89). We disagree. In Stephens, a Georgia jury sentenced a habeas corpus petitioner to death based on a number of aggravating circumstances, including one circumstance later held unconstitutional. 631 F.2d, at 405, 406. Because it was impossible for the reviewing court to determine the extent of the impact of the unconstitutional circumstance on the jury's verdict--i.e., whether the jury would have voted to impose the death sentence absent the invalid circumstance--the Fifth Circuit struck down the sentence. Id. at 406.

The focus of the Stephens case was the impossibility of rational review of the Georgia jury's actions, and that decision did not forge a rigid rule rendering unconstitutional the imposition of the death penalty in all cases in which invalid

aggravating circumstances are considered by the sentencing authority. The Georgia statute involved in Stephens differs from the Florida sentencing statute. For example, under the Georgia statute involved in Stephens, the jury was not required to state what mitigating circumstances, if any, were considered; by contrast, under Florida law the trial judge was at the time of Messer's sentencing (and is today) required to prepare written findings reciting both aggravating and mitigating circumstances. The Florida Supreme Court has repeatedly held that reversal of death sentences is not required merely because invalid aggravating circumstances are considered, even when coupled with a mitigating circumstance, so long as it can be known that the result of the weighing process would not have been different had the impermissible factors not been present. Brown v. State, 381 So.2d 690 (Fla. 1980); Armstrong v. State, 399 So.2d 953 (Fla. 1981). It is submitted that Stephens does not impinge upon this rule.

But beyond being distinguishable from Florida death penalty procedures, it is submitted that the underpinning of Stephens is shaky at best. Let's revisit Stephens for a few minutes. There, the Fifth Circuit relied primarily on the authority of Stromberg v. California, 283 U.S. 359 (1931), Accord, Bachellar v. Maryland, 397 U.S. 564 (1970), Street v. New York, 394 U.S. 576 (1969), Yates v. United States, 354 U.S. 298 (1957), in vacating the death penalty. In Stromberg, supra, at 367-68, this Court noted that where there was a general verdict of guilty, which could have rested on three grounds, one of which was unconstitutional, it was impossible to tell on which ground the verdict rested and the conviction had to be set aside. Similarly, Bachellar v. Maryland, supra, Street v. New York, supra, and Yates v. United States, supra, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground.

Respondent agrees that if the penalty verdict in Stephens' trial had been, for example, "[w]e the jury find an aggravating circumstance to exist and recommend the death penalty," then the penalty verdict would have to be set aside. What is manifestly clear is that the penalty verdict in Stephens' trial was not a general verdict. The jury found three aggravating circumstances, one of which was later declared to be unconstitutional. However, the Fifth Circuit stated that as to the two other aggravating circumstances there was no uncertainty as to either of them and either of them would be legally sufficient for the jury to impose the death penalty.

The Georgia Supreme Court has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 265 S.E.2d 797 (Ga. 1980); Gates v. State, 261 S.E.2d 349 (Ga. 1979). This Court denied certiorari in both of these cases. Burger v. Georgia, 446 U.S. 988 (1980); Gates v. Georgia, 445 U.S. 938 (1980). Concurring in the denial of certiorari in Westbrook v. Balkcom, ___ U.S. ___, 101 S.Ct. 541, 66 L.Ed.2d 298 (1980), Justice Stevens remarked as follows:

> The Georgia Supreme Court...decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable.... [T]he Georgia Supreme Court's position is clear, and...I consider it consistent with this Court's decisions.

66 L.Ed.2d, at 298.

It is unmistakable that the decision of the Fifth Circuit to vacate Stephens' death penalty conflicts with well-settled Georgia law declaring prior non-capital convictions admissible during the penalty phase of a death case; it conflicts with the

reasoning of this Court in Gregg v. Georgia, 428 U.S. 153, 161-62 (1976); it conflicts with Justice Stevens' concurring opinion in Westbrook v. Balkcom, supra; and it certainly conflicts with this Court's decision to deny certiorari in Burger v. State, supra; and Gates v. State, supra. In sum, Stephens falls far short of requiring the vacation of petitioner's death sentence.

Contrary to petitioner's conjectural suppositions, the trial judge in reviewing the evidence presented at the sentencing hearing found no mitigating circumstances. In so doing, the trial judge remarked as follows:

> f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

(App. F-3,4) Consequently, there is no fear that a valid mitigating circumstance was offset by a consideration of an improper aggravating circumstance.

Respondent believes that the sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty may be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories is present. As pointed out in Gregg v. Georgia, supra, at 188-198, this requirement serves to "limit" and "channel" the discretion of the jury in making the sentencing decision. Once this determination is made (and assuming that an aggravating circumstance is found), the issue is whether the death penalty should be imposed, and the language of the statutory aggravating circumstances have nothing to do with this

question--rather, this decision is made by the sentencing authority (sub judice, the trial judge) based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function regardless of the presence or absence of others, then it is believed that the invalidity of any aggravating circumstance considered by the sentencing authority would taint the death sentence in only two circumstances: (1) if the invalid aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law); or (2) if the invalid circumstance somehow resulted in the introduction of evidence at the punishment phase which would not otherwise have been admissible.

First, it is emphasized that the improper consideration of one statutory aggravating circumstance had no possible impact upon whether the death penalty could be imposed in the instant case because there remained three valid aggravating circumstances properly considered by the trial judge, either one of which would independently have permitted the consideration of capital punishment as an alternative. In other words, the existence of one valid aggravating circumstance in the absence of any mitigating circumstances will justify the imposition of the death sentence. Armstrong v. State, supra, Sireci v. State, 399 So.2d 964 (Fla. 1981). Second, the improper consideration of one statutory aggravating circumstance by the trial judge had no possible impact upon whether the death penalty should be imposed in this case because it had no effect whatsoever upon the evidence which was before the jury in the penalty phase. Under these circumstances, it cannot reasonably be argued that the consideration of one improper aggravating circumstance together with an additional three admittedly valid statutory aggravating

circumstances violated petitioner's constitutional rights. The Fourteen Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. See Ingraham v. Wright, 430 U.S. 651, 675 (1977); Donnelly v. DeChristoforo, 416 U.S. 637, 642-643 (1974). It is submitted that fundamental fairness--the integrity of the capital sentencing process--was in no way impaired in the instant case.

III.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

The thurst of petitioner's argument under this point bears a remarkable similarity to the one presented to the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). There, 123 inmates on death row asserted that the Florida Supreme Court had violated their right to due process in the context of appellate review because that court presumably in an unidentified number of cases requested and received information beyond the trial record, thus allegedly violating this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). Based on this major assertion, it was further contended that they had been denied the right to effective assistance of counsel, denied the right to confrontation, denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of assistance of counsel in exercising said rights. The Florida Supreme Court found their claims wanting. In so doing, the court remarked in pertinent part as follows:

> Turning to the legal issues presented, we perceive that petitioners' several constitutional claims all emanate from their assertion that we have "engaged in

the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." . . . The receipt of this information, petitioners assert generally, has led to a rash of constitutional violations ranging from a denial of due process in individual cases where information was received, on the one hand, to a pervasive violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in all capital cases reviewed and affirmed by the Court, on the other hand. . . .

Despite strident characterizations of our receipt of these materials, and notwithstanding the vigor and pith of the hypotheses on which petitioners depend, the doctrines of constitutional law here argued are singularly unpersuasive. . . .

Florida's death penalty statute, section 921.141, Florida Statutes (1979), directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. . . .

This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. . . .

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. . . .

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances.

* * * * *

Petitioners' contentions in this proceeding are essentially grounded on Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Gardner stands for the proposition that a sentence of

death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. Id. at 362, 97 S.Ct. at 1206. Since we do not "impose" sentences in capital cases, Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information. The Kentucky Supreme Court explained the distinction which has eluded petitioners in Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978), responding to the very assertion that is made here concerning the review of "non-record" materials in capital cases:

> Every opinion from a case book, every test or treatise, every law review article, every philosophical, historical or religious document a judge might see fit to read and consider, including the Holy Bible, is a tangible source of information from which he may pick and choose in arriving at a judgment.
>
> * * * * *
>
> There are obviously differences between individualized information pertaining to the defendant personally, which is to be considered by a trial judge in fixing a sentence, and the impersonal data that may be used by an appellate court in determing whether the judgment of a trial court is or is not in line with what has been done in comparable cases.
>
> * * * * *
>
> It seems to us that the difference is quite fundamental. If a judge or jury deciding one's fate is going to consider reports of what other people say about him, certainly he should be entitled to see them. "The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." Gardner v. Florida, supra, at 430 U.S. 359, 97 S.Ct. 1205. But we are not the sentencing court. In any given case before us we intend to comply with the statutory request to include in our decision a reference to those similar cases that have been taken into consideration. Presumably, however, the petitioners want to know not only what will be taken into consideration, but what will not, and to know it in advance, so that they can urge upon us what to choose and what to avoid.

* * * * *

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

Id. at 625 27 (footnote omitted).

> It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in Proffitt and in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
>
> A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, Alford v. State, 355 So.2d 108 (Fla.), cert. denied, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.
>
> The upshot of this is that petitioners' claims are untenable.

Id. at 1330, 1331, 1332, 1333. This Court denied certiorari. Brown v. Wainwright, ___ U.S. ___ (1981), 30 CrLRep. 4066. See also Foster v. Strickland, 517 F.Supp. 597, 607 (N.D.Fla. 1981), and Ford v. Strickland, ___ F.Supp. ___ (S.D.Fla. 1981), Case No. 81-6663-Civ-MCR, opinion filed December 10, 1981.

It should be noted that petitioner in his pleadings has failed to demonstrate that the Florida Supreme Court either

requested or received or considered any non-record information concerning his appeal. The appendix submitted with petitioner's petition contains no documentation of extra-record information that was or may have been used on petitioner's appeal from his judgment, and more particularly, from the imposition of the death penalty. Moreover, petitioner's attempt to obtain relief on the basis that the rights of others may have been violated must fail because constitutional rights are personal and may not vicariously be asserted. Rakas v. Illinois, 439 U.S. 128 (1978).

Assuming for the moment that Gardner v. Florida, supra, is applicable to appellate reviewing courts, it is submitted that in petitioner's case there has been no allegation that such information was used, always assuming, of course, that it was requested in the first instance. As observed in Gardner, the trial court had information not available to Gardner:

> In those cases in which the accuracy of the report is contested, the trial court can avoid delay by disregarding the disputed material.

51 L.Ed.2d, at 403. Indeed, this Court in denying certiorari in Alford v. State, 355 So.2d 108 (Fla. 1977), cert. denied, 436 U.S. 935, refused to review a case where the trial court had information from a presentence investigation report that was not made available to defendant, but was not used. The Florida Supreme Court in addressing this issue remarked as follows:

> In response to the motion to vacate, the State says that, assuming the judge was "made aware" of certain facts that doesn't mean that he "considered' those facts in imposing sentence. The State draws a distinction between being "aware" of certain facts and "considering" them. We agree. The United State Supreme Court in Gardner recognized the ability of the sentencing judge to disregard material in imposing sentence....

355 So.2d, at 109. See also United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976).

Petitioner's assertions of deprivations of constitutional rights are more chimerical than real. How can petitioner be denied due process of law when the sentencing authority (trial judge) utilized no information unavailable to him? Gardner v. Florida, supra, only prohibits the one who imposes sentence from considering factual matters unavailable to the defense. Gardner has never been held to require appellate courts to furnish all their information to a defendant. Indeed, to the contrary, in Ex Parte Farley, 577 S.W.2d 617 (Ky. 1978), the Kentucky Supreme Court had this to say:

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay for inspection by the appellant, even in a capital case, all the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

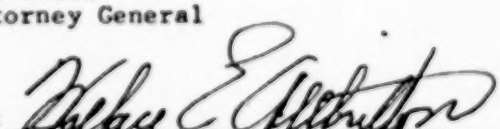
577 S.W.2d, at 627. It is submitted that this Court's pronouncement in Gardner v. Florida, supra, is limited to the trial court, the "imposer" of the sentence. It follows that petitioner's reliance on Gardner is woefully misplaced.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

By: 
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290